

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5th
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

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BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

Docket No. CWA-07-2008-0024

Parkway Development Company, Inc.
3516 NW Winding Woods Dr.
Lees Summit, Missouri 64064

FINDINGS OF VIOLATION,
ORDER FOR COMPLIANCE

Respondent

Proceedings under Section 309(a) of the
Clean Water Act, 33 U.S.C. § 1319(a)

Preliminary Statement

1. The following Findings of Violation and Order for Compliance ("Order") are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA, Region VII and further delegated to the Director of Region VII's Water, Wetlands and Pesticides Division.

2. Respondent is Parkway Development Company, Inc. (hereinafter "Respondent"), a company incorporated under the laws of Missouri and authorized to do business in the State of Missouri.

3. The Findings of Violations and Order for Compliance address discharges of pollutants by Respondent into the waters of the United States without the permit(s) required by law. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of "pollutants" by any "person" into "navigable waters" as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in compliance with, *inter alia*, a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344 or Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers, for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

4. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

5. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p), 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Section 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

6. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

7. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) requires dischargers of storm water associated with industrial activity to apply for an individual permit to seek coverage under a promulgated storm water permit.

8. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan for development or sale.

9. The Missouri Department of Natural Resources (MDNR) is the state agency with the authority to administer federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with delegated states for violations of the CWA.

10. The MDNR issued a General Permit for the discharge of storm water under the NPDES, Permit No. MO-R101000 (the General Permit). The general permit governs storm water discharges associated with construction or land disturbance activity (e.g., clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

Factual Background

11. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. At all times relevant to this action, Respondent was the owner and/or operator of a 146 acre residential construction site known as Parkway Estates Residential Subdivision, located at Adams Dairy Parkway and Moreland School Road in Blue Springs, Missouri (the Site).

13. During the time periods of the discharges of dredged and/or fill material into a tributary of Blue Branch, Respondent owned and/or operated on the property on which the discharges took place.

14. Storm water, snow melt, surface drainage and runoff water flows from the Site via an unnamed tributary into Blue Branch and then into Sni-A- Bar Creek. The runoff and drainage from Respondent's facility is "storm water" as defined by 40 C.F.R. § 122.26(b)(13).

15. Storm water contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

16. Respondent's storm water runoff from the Site is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

17. The Site is a "point source" which has caused and continues to cause the "discharge of pollutants" as defined by CWA Section 502, 33 U.S.C. § 1362.

18. Respondent discharged pollutants via an unnamed tributary into the Blue Branch and Sni-A-Bar Creek, all of which are "navigable waters" as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

19. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

20. Respondent applied for and was issued NPDES permit coverage under the General Permit described above. MDNR issued Respondent Permit No. MO-R108739 (The Permit) on February 8, 2007.

21. On October 2, 2007, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the evaluate compliance with the CWA.

22. At various times starting on or about, June 2007, Respondent, and/or persons acting on his behalf, discharged dredged or fill material into a tributary of Blue Branch located north of SE Shamrock Drive. The Respondent, and/or persons acting on their behalf used earth-moving equipment to install four rock check dams.

23. The dredged and/or fill materials discharged by Respondent into the tributary of Blue Branch includes spoil, rock, sand and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

24. The discharge of the dredged and/or fill material into the tributary of Blue Branch referenced above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

25. The earth moving equipment referenced above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

26. Respondent's discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to 404 of the CWA, 33 U.S.C. § 1344.

Findings of Violation

Count 1

Failure to Comply with Narrative Water Quality-Based Effluent Limitations or Conditions

27. The facts stated in paragraphs 1 through 26 above are herein incorporated.

28. Paragraph 1 of the Requirements section of Respondent's permit states in part that storm water shall not cause a violation of the state water quality standards, including but not limited to the following conditions:

- a. Waters shall be free from substances in sufficient amounts to cause the formation of putrescent, unsightly or harmful bottom deposits or prevent full maintenance of beneficial uses.
- c. Waters shall be free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor or prevent full maintenance of beneficial uses.
- g. Waters shall be free from physical, chemical, or hydrologic changes that would impair the natural biological community.

29. The inspection and observations referenced above reveal that Respondent had discharged storm water laden with silt/sediment into an unnamed tributary of and into Blue Branch, causing the occurrence of conditions contained in Paragraph 1(a) and (c) and (g) of the Requirements section of Respondent's permit.

30. Respondent's discharge of storm water is a violations of Paragraphs 1(a), (c), and (g) of the Requirements section of Respondent's Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 2

Failure to Install and Maintain Best Management Practices (BMP)

31. The facts stated in paragraphs 1 through 26 are herein incorporated.

32. Paragraph 8 of the Requirements section of Respondent's permit states in part:

- c. Selection of Temporary and Permanent Non-Structural BMP: The permittee shall select appropriate non-structural BMPs for use at the site and list them in the Storm Water Pollution Prevention Plan (SWPPP). The SWPPP shall require existing vegetation to be preserved where practical. The time period for

disturbed areas without vegetative cover shall be minimized to the maximum extent practicable

- f. Disturbed Areas: Where soil disturbing activities cease in an area for 14 days or more, the permittee shall construct BMPs to establish interim stabilization. Interim stabilization shall consist of well established and maintained BMPs that are reasonably certain to protect waters of the state from sediment pollution over an extended period of time. This may require adding more BMPs to an area than is normally used during daily operations. These BMPs may include a combination of sediment basins, check dams, sediment fences, and mulch. The types of BMPs used must be suited to the area disturbed, taking into account the number of acres exposed and the steepness of the slopes.
- g. Installation: Peripheral or border BMPs to control runoff from disturbed areas shall be installed or marked for preservation before general site clearing is started. Storm water discharges from disturbed areas, which leave the site, shall pass through an appropriate impediment to sediment movement, such as a sedimentation basin, sediment traps, silt fences, etc. prior to leaving the land disturbance site.
- h. Sedimentation Basins: The SWPPP shall require a sedimentation basin for each drainage area with 10 or more acres disturbed at one time. The sedimentation basin shall be sized to contain a volume of at least 3600 cubic feet per each disturbed acre draining thereto. Accumulated sediment shall be removed from the basin as needed to ensure proper operation. Discharges from the basin shall not cause scouring of the banks or bottom of the receiving stream. The SWPPP shall require the basin be maintained until final stabilization of the disturbed area served by the basin. Where use of a sediment basin of this size is impractical, the SWPPP shall evaluate and specify other similarly effective BMPs to be employed to control erosion and sediment delivery.

33. The inspection referenced above revealed that there was no silt fence installed where they were called for on the SWPPP map and construction schedule.

34. The inspection referenced above revealed that the site check dams were not properly constructed. The rock utilized for the dams was inappropriately sized and ineffective at preventing sediment from leaving the site.

35. The inspection referenced above revealed that the Respondent failed to properly install and operate a sedimentation basin or similarly effective BMPs for each drainage area with 10 or more acres of disturbed land.

36. Paragraph 11 of the Requirements section of Respondent's permit states that the permittee shall at all times maintain all pollution control measures and systems in good order to achieve compliance with the terms of the general permit.

37. The inspection listed above revealed that the rock check dams were in need of cleaning and silt fence around the dams and storm sewer inlets were down.

38. Respondent's failure to install and maintain BMPs is a violation of Paragraphs 8 and 11 of the Requirements and Guidelines section of Respondent's Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 3

Failure to Perform and Document Site Inspections

39. The facts stated in paragraphs 1 through 26 above are herein incorporated.

40. Paragraph 10 of the Requirements section of Respondent's permit states in part that "the permittee shall conduct regularly scheduled inspections at least once per seven calendar days. A log of each inspection and copy of the inspection report must be retained on the construction site."

41. The inspection referenced above reveal that Respondent did not keep a log of inspections from January 2007 through late June 2007, did not adequately describe information pertaining to which BMP was inspected or where it was located, and Respondent did not sign the report after making his inspection of the site.

42. Respondent's failure to document site inspections is a violation of Paragraph 10 of the Requirements and Guidelines section of Respondent's Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 4

Failure to Amend/Update the SWPPP

43. The facts stated in paragraphs 1 through 26 above are herein incorporated.

44. Paragraph 9 of the Requirements and Guidelines section of Respondent's permit requires in part for Respondent to amend and update the SWPPP as appropriate during the term of the land disturbance activity and at a minimum, whenever the:

- c. Permittee's inspections indicate deficiencies in the SWPPP or any BMP;
- e. SWPPP is determined to be ineffective in significantly minimizing or controlling erosion and sedimentation (e.g., there is visual evidence, such as excessive site erosion or excessive sediment deposits in streams or lakes).

45. The inspections and observations referenced above, reveal that Respondent has failed to effectively and adequately amend/update the SWPPP, specifically, Respondent failed

to include all the BMPs which were in place on the site such as the dirt berms and rock check dams in the SWPPP in lieu of the identified BMP, silt fence.

46. Respondent's failure to amend/update the SWPPP is a violation of Paragraph 9 of the Requirements and Guidelines section of Respondent's Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 5

Failure to Obtain Section 404 Permit for Discharges of Dredged and/or Fill Materials

47. The facts stated in Paragraphs 1 through 26, above, are herein incorporated.

48. At the time of Respondent's construction and installation of check dams within the unnamed tributary and the resulting discharge of dredge and fill materials (i.e. pollutants), as described above, the discharge sites were within the "waters of the United States," within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

49. Respondent's discharges of dredged and/or fill material (i.e., pollutants) from a point source into a water of the United States were performed without a permit issued pursuant to 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

50. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

Order For Compliance

51. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in the paragraphs below

52. Within fifteen (15) days after receipt of this Order, Respondent shall notify EPA in writing whether it intends to comply with the terms of this Order.

53. In the event Respondent states that it does not intend to comply with the terms of this Order and/or fails to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order and/or seek additional penalties for such noncompliance with the terms of Order.

Restoration Plan

54. Within thirty (30) days after receipt of this Order, Respondent shall submit a Restoration Plan to EPA for review and approval that shall satisfy the following requirements and include, at a minimum, the following information:

- a. The Restoration Plan shall be prepared by a Professional Engineer (P.E.) with a background in hydrology;
- b. The Restoration Plan shall include an analysis of the hydrology of the discharge sites and/or areas impacted by the discharges, that is presented in sufficient detail to determine the areas impacted by the discharges, quantity of flows and to provide an adequate basis for review of the Plan;
- c. The Restoration Plan shall identify and describe the design of all drainage control devices (erosion control, dams, etc.) that control drainage into the areas impacted by the discharges of illegal fill;
- d. The Restoration Plan shall identify all areas of the tributary of Blue Branch directly impacted by the discharges of illegal fill (i.e., that have suffered erosion, backup of water, overcutting by water), and all downstream areas impacted by sedimentation from the site;
- e. The Restoration Plan shall propose the work required to remove the discharged fill and to restore the tributary of Blue Branch to pre-discharge configurations, including, the work required to remove fill from the discharge sites and to fill the created channel;
- f. The Restoration Plan shall describe the types of equipment proposed to accomplish the removal of the fill, methods to minimize erosion during the removal of fill and designated upland disposal locations for the removed fill;
- g. The Restoration Plan shall evaluate alternatives for bank stabilization, and propose an appropriate method(s) of bank stabilization designed to prevent future erosion (i.e., placement of sod or seeding of new grass, placement of erosion control devices such as rip rap);
- h. The Restoration Plan shall identify any additional proposed areas of fill within the tributary of Blue Branch that are required to implement the Restoration Plan and shall describe compaction and surface stabilization methods for such proposed fill areas. Specifically, the Restoration Plan shall identify the work required to fill the created channel and to restore flow solely to the original channel of the tributary of Blue Branch; and

i. The Restoration Plan shall propose a schedule of no more than twelve (12) months to accomplish the removal of the fill and the restoration and stabilization of areas impacted by the fill.

55. At its sole discretion, EPA may elect to approve the Restoration Plan as submitted by Respondent, return the Restoration Plan for modification and resubmission by Respondent, or modify the Restoration Plan and then approve the Restoration Plan as modified. Compliance with the Restoration Plan, as approved by EPA, shall be enforceable under the authority of this Order for Compliance and the CWA.

56. In accordance with the requirements and schedules contained in the approved Restoration Plan, Respondent shall remove the discharged fill materials described in Paragraph A.5, above, to upland sites and shall restore the discharge sites to their condition prior to such discharges in a manner that will address the ongoing adverse impacts of the illegal discharges.

57. Upon approval of the Restoration Plan by EPA, thereafter Respondent shall report in writing to EPA each month on all work undertaken pursuant to the requirements of the approved Restoration Plan.

SWPPP Modification

58. Respondent shall immediately implement all requirements of Respondent's existing SWPPP that have not been implemented thus far.

59. Within thirty (30) days of the effective date of this Order, Respondent shall submit in writing proposed amendments to the SWPPP, developed by qualified personnel, detailing the specific actions necessary to correct the violations cited herein including detailing what action is required to correct the deficiencies and eliminate and prevent reoccurrence of the violations cited above, and a schedule for implementation and reporting the results to come into compliance with all of the applicable requirements of the permit.

60. Upon receipt of EPA's approval of the Plan, Respondent shall implement such plan in accordance with the schedule contained therein.

61. The EPA will review each submission of a plan or report by Respondent, and notify Respondent in writing of the EPA's approval or disapproval of the plan or report, or any part thereof. If a submission is disapproved in whole or in part by the EPA, the EPA will provide written comments to Respondent explaining the basis for its decision. Within ten (10) days of receipt of the EPA's disapproval pertaining to any submission, Respondent shall amend/revise the disapproved submission, addressing all of the EPA's comments, and resubmit same to the EPA. If the EPA disapproves the revised submission, the EPA may modify and approve the same in accordance with its previous comments. In the event of such modification and approval, the EPA will notify Respondent of the modification/approval.

Submissions

62. All documents required to be submitted to the EPA by this Order or by the approved Restoration Plan, shall be submitted by mail to:

Michael Boeglin
WWPD/WENF
EPA Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

63. At the time of its submission to EPA, Respondent shall also provide a copy of the proposed Restoration Plan to Mr. Mark Frazier, Acting Branch Chief, United States Army Corps of Engineers at the following address:

United States Army Corps of Engineers
Kansas City District
700 Federal Building
601 E. 12th Street, Room 706
Kansas City, Missouri 64106.

General Provisions

64. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

65. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the Act, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by the EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

Access and Requests for Information

66. Nothing in this Order shall limit the EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

67. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

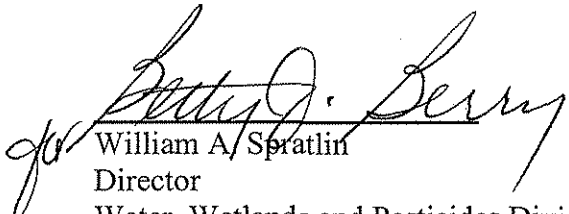
Effective Date

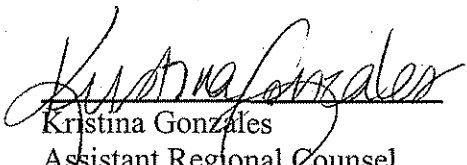
68. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

Termination

69. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 20th day of January, 2008.


William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101


Kristina Gonzales
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Roy Allen
Registered Agent
Dalton's Ridge Residential Development
3516 NW Winding Woods Dr.
Lee's Summit, Missouri 64064;

Karl Fett
Director
Missouri Department of Natural Resources
Kansas City Regional Office
500 NE Colbern Road
Lee's Summit, Missouri 64086;

Mr. Kevin Mohammadi, Chief
Enforcement Section
Water Pollution Control Program
Missouri Dept. of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102.

1/29/08
Date

